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Equality Is a Brokered Idea

Robert L. Tsai*

ABSTRACT

This essay examines the Supreme Court's stunning decision in the census case, Department of Commerce v. New York. Professor Robert Tsai characterizes Chief Justice John Roberts's decision to side with the liberals as a collective effort to pursue the ends of equality by other means—by subjecting the government's action to the rule of reason. Although the issue for appeal was limited in scope, the stakes for political and racial equality were sky high. In blocking the administration from adding a citizenship question to the 2020 Census, five members of the Court found the justification the administration gave to be a pretext. In this instance, official lies had a major consequence: Republican officials were not permitted to carry out their apparent scheme to engage in partisan entrenchment by depressing census responses from Hispanic citizens and undocumented migrants. Professor Tsai defends this creative effort to manipulate the political value of time and shows how the Court's rationale operates as an effective substitute for the principle of equality under difficult circumstances. Unequal policies flourish in an environment where mendacity by public officials is tolerated. It follows that by ensuring there are consequences for policies backed by lies, judges can make it harder to target political minorities with impunity.

INTRODUCTION

We have long been warned not to expect too much from people when it comes to defending the principle of equality. Take the U.S. Supreme Court. For every *Strauder v. West Virginia*,¹ *Brown v. Board of Education*,² or *Obergefell v. Hodges*³ that extended equal respect to those previously denied

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¹ 100 U.S. 303, 308 (1880) (invalidating state law that forbid black males from serving on juries because law “is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to . . . race prejudice”).

² 347 U.S. 483, 495 (1954) (holding that state’s segregation of schoolchildren according to race was “inherently unequal”).

³ 135 S. Ct. 2584, 2608 (2015) (concluding that laws forbidding same-sex marriage denied “equal dignity”).

it, there is a disastrous ruling like *Plessy v. Ferguson*,⁴ *McCleskey v. Kemp*,⁵ or *Trump v. Hawaii*⁶ that provided cover for major inequities and demoralized friends of equality—sometimes lasting for generations. And if we think that even the rulings that are praiseworthy have faults of their own, these outcomes can actually be mapped somewhere between horrible and pretty good, with few if any truly outstanding defenses of equality.

There are several explanations why we have had such a hard time doing the work of equality in vigorous fashion. Political scientists have shown us that courts generally, but the Supreme Court in particular, behave in largely majoritarian fashion despite certain design choices originally made by the Constitution's framers to facilitate a degree of independence.⁷ When federal judges strike down laws, they have tended to be most confident vindicating national norms (including constitutional rights) when state laws are involved.⁸ By contrast, the desire to remain part of the national elite and to avoid an open clash with a coordinate branch is a recurring theme of the federal judiciary's history, so when the Court has invalidated a federal law, it's usually been when no real fear of backlash exists or when Justices have found it safe enough to prune a national policy.⁹

Critical theorists have a different explanation, but it's also built upon this same basic majoritarian insight: they say that progress on equality, particularly when it comes to safeguarding the rights of African Americans, has been made only when white citizens have perceived some advantage to come from enlarging the notion of equality, producing what Derrick Bell famously called a "convergence of . . . interests."¹⁰ But whatever explanation

⁴ 163 U.S. 537, 550–51 (1896) (upholding racially segregated railroads).

⁵ 481 U.S. 279, 287, 291, 297 (1987) (rejecting equal protection challenge to Georgia's death penalty despite study that showed black defendants are significantly more likely to be sentenced to death than white defendants).

⁶ 138 S. Ct. 2392, 2423 (2018) (upholding ban on travel from several majority Muslim countries).

⁷ See generally PAMELA BRANDWEIN, *RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH* (1999); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Lee Epstein et al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583 (2001).

⁸ See, e.g., Frank B. Cross & Stefanie A. Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. REV. 1752, 1774–82 (2007). More refined data suggests that liberal Justices have generally been more willing to strike down state laws than federal laws over the years, and that conservative Justices have shown a slightly greater willingness to strike down federal laws over state laws. See *id.* at 1768–70.

⁹ See Dahl, *supra* note 7, at 287–88.

¹⁰ Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 526 (1980). Bell's original account made it largely a black-white dynamic, and some scholars have subsequently sought to build more complexity into

one prefers, it seems clear that civic leaders must feel it sufficiently culturally safe, legally productive, and institutionally worthwhile before they will act to enforce the idea of equality.

I. PRACTICAL EGALITARIANISM

I have recently presented a refinement of these accounts. In my new book, *Practical Equality*,¹¹ I argue that what's crucial is not so much conceptual differences that prevent institutions from doing the hard work of equality (although such disagreements certainly exist), but rather practical concerns decisionmakers have about the actual effects of equality—real or imagined.¹² Human beings are far more consequentialist in their decision making than they are willing to admit. Accordingly, they have proven themselves willing to adjust their principles when they do not like where steadfast commitment to those principles might lead. Hesitation over the consequences of equality has sometimes led to lousy excuses, gigantic exceptions, and cynical ploys to duck hard questions. While we shouldn't give in completely to outcome-based thinking, neither should we deny that concerns about the effects of equality—what Justice William Brennan once called “a fear of too much justice”¹³—can dampen the idea's potency.

Putting off a decision or accepting a watered-down theory of equality might be justifiable when the risk of disaster outweighs the potential for incremental progress, of course, so I'm not inalterably opposed to such strategies, but they do come with their own costs. My main point is that there are more options than deferral or appeasement for managing the stress that comes from equality claims.

his theory. See, e.g., Sheryll D. Cashin, *Shall We Overcome? Transcending Race, Class, and Ideology Through Interest Convergence*, 79 ST. JOHN'S L. REV. 253, 274 (2005).

¹¹ ROBERT L. TSAI, PRACTICAL EQUALITY: FORGING JUSTICE IN A DIVIDED NATION (2019).

¹² See William M. Carter, Jr., *The Thirteenth Amendment, Interest Convergence, and the Badges and Incidents of Slavery*, 71 MD. L. REV. 21, 26 (2011); Richard Delgado, *Why Obama? An Interest Convergence Explanation of the Nation's First Black President*, 33 LAW & INEQ. 345, 361–62 (2015); Lana Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92, 98 (2004); Alexander Nourafshan & Angela Onwuachi-Willig, *From Outsider to Insider and Outsider Again: Interest Convergence and the Normalization of LGBT Identity*, 42 FLA. ST. U. L. REV. 521, 522 (2015).

¹³ *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting). There, the Supreme Court in a 5–4 vote rejected a death-row inmate's racial discrimination claim largely because of the perceived effects on the criminal justice system as a whole. This prompted Brennan's famous rejoinder. In my book, I revisit the debate behind the scenes, emphasizing how this fear of system-wide effects from the principle of equality took on a larger-than-life role in Justice Powell's thinking. He took an active role lobbying his colleagues against the defendant's position.

Nor should we forget the importance of institutional context. At least in this life, there's no such thing as pure equality. Already a deeply fraught idea, the meaning of equality exists only as a product of multiple compromises between people with different philosophical outlooks who inhabit institutions that possess the actual power to reduce human suffering. Inequities can only be ameliorated by finding effective ways to unlock that power.

Thus, we ignore the recurring roadblocks to equality at our peril. By failing to account for the many reasons why people in power hesitate to vindicate the ideal of equality, we actually miss out on opportunities to reduce inequities that might lie before us. Additionally, while there may be short-term glory in fighting the good fight and going down swinging, it might be better in the long term to avoid a terrible, demoralizing defeat, as long as doing so can be said to improve the conditions of the marginalized in some way.

So, what are the sorts of things we fear from the idea of equality? The most frequently occurring impediments to vindicating an equality claim are concerns about altering a valuable social good, the risk of political backlash, and even a distaste for branding someone a bigot.¹⁴ No matter which conception we might prefer, equality is an inherently disruptive idea.¹⁵ Religious accounts capture this essential truth.¹⁶ Our own troubled past has also underscored this lesson, even if not everyone is willing to learn from it.

For instance, it's worth recalling that in 1953 the Supreme Court nearly reaffirmed *Plessy*. Even as the Justices bought time for themselves by scheduling the case for reargument after a conference failed to produce five votes favoring the principle of racial equality, they struggled with the very tangible fear that ruling in favor of the black schoolchildren would lead to "subversion or even defiance of our mandates in many communities" (as Justice Tom Clark explained) or portend "the end of Southern liberalism" (as Justice Hugo Black put it).¹⁷ With the mythological status accorded *Brown*

¹⁴ See TSAI, *supra* note 11, at 13–25.

¹⁵ Anti-subordination accounts are perhaps more vigorous than formalistic ones, but even formal equality has some bite: when a certain group has been excluded from a social good. The re-ordering that's required after formal exclusion will almost always be disruptive in some respects. For an overview of the anti-subordination approach, see Ruth Colker, *The Anti-Subordination Principle: Applications*, 3 WIS. WOMEN'S L.J. 59, 59–60 (1987).

¹⁶ Early Christianity's elevation of table fellowship as an ideal for equal status within the community, one that included the women, the lame, and the poor, was so dangerous that it led to denunciations. Jesus of Nazareth himself is remembered to have warned: "Do not suppose that I have come to bring peace to the earth: it is not peace I have come to bring, but a sword." *Matthew* 10:34 (New Jerusalem).

¹⁷ See TSAI, *supra* note 11, at 24–25. See generally *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

today, it's also easy to ignore the fact that barely a majority of Americans supported the ruling when it first came down in 1954.¹⁸ In other words, a fragile institutional consensus among elites was forged first, and decisive cultural support emerged only later.¹⁹

Faced with the potentially undesirable effects of equality, one answer is to sharply limit the reach of the principle of equality; another is to bob and weave to avoid addressing tough questions. Those are the choices that run through the heads of most decisionmakers.

But all is not lost. There is another option. Sometimes, it's better to recharacterize an equality dispute in a slightly different way to reframe the stakes, when doing so has a shot at securing the support of crucial allies and lifting someone's unequal burdens right away. I call this *practical egalitarianism*, which is a fancy term for doing the work of equality by other means. We could instead see a controversy over equality as a due process matter or one that's governed by the rule of reason, or in the right circumstances, as best resolved according to some other principles. If such an opportunity arises and the dispute is handled with an egalitarian mindset, it can be possible to both reduce the harms suffered by a marginalized community and create a precedent that can help build a culture of equality.

II. RULE OF REASON IN ACTION—THE CENSUS CASE

Of all the Supreme Court's decisions last term, the most intriguing example of Justices doing the work of equality by other means can be found in the recent census case. By a 5–4 vote, Justice John Roberts's opinion in *Department of Commerce v. New York*²⁰ (The Census Case) dismantled the Trump administration's argument that its motive for including a question about the citizenship of respondents was to enforce the Voting Rights Act.²¹ In a surprising turn of events, the majority affirmed the lower court's preliminary injunction blocking the new query on the ground that "the sole stated reason [] seems to have been contrived."²² Commerce Secretary Wilbur Ross had already long ago decided to add the question, and only then did the agency run around seeking another agency to support its call for citizenship information.²³ Although the Department of Justice ("DOJ")

¹⁸ See Robert L. Tsai, *Sacred Visions of Law*, 90 IOWA L. REV. 1095, 1135–36 (2005).

¹⁹ On the role of the Cold War in changing attitudes about civil rights, see generally MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS* (2011).

²⁰ 139 S. Ct. 2551 (2019).

²¹ See *id.* at 2574–76.

²² *Id.* at 2575.

²³ See *id.* at 2574.

eventually backed the Department of Commerce (“DOC”), DOJ never behaved like this information was useful for its voting rights work.²⁴

Roberts joined the four liberals on the Court by invoking the rule of reason, emphasizing that “[t]he reasoned explanation requirement of administrative law . . . is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public.”²⁵ In doing so, he confounded the administration and brought his usual conservative comrades on the Court to denounce him for spearheading an “unprecedented departure from our deferential review of discretionary agency decisions”²⁶ and “usher[ing] in an era of ‘disruptive practical consequences’”²⁷ President Trump himself is said to have seethed privately about Roberts’s role in thwarting his plot.²⁸

Deploying the rule of reason is not the same thing as enforcing the equality principle in a full-throated way because it lacks the precise condemnatory rhetoric associated with equality, but that almost certainly was not going to happen anyway in the case presented to the High Court. In fact, the district judge had already rejected the equality claim and instead opted for the alternative rationale that the agency hadn’t presented a reasonable justification for its decision as required by the Administrative Procedure Act.²⁹ Subsequently, in granting review, the Supreme Court had not opted to review the Equal Protection claim.³⁰ Even so, the real mystery

²⁴ See *id.* at 2575.

²⁵ *Id.* at 2575–76.

²⁶ *Id.* at 2576 (Thomas, J., dissenting).

²⁷ *Id.* at 2605–06 (Alito, J., dissenting).

²⁸ See Asawin Suebsaeng, *Trump Declares from the Rose Garden He’s Not Owned on the Census*, DAILY BEAST (July 11, 2019, 6:49 PM), <https://www.thedailybeast.com/2020-census-citizenship-question-trump-declares-from-the-rose-garden-hes-not-owned> [<https://perma.cc/9G2C-RFEU>].

²⁹ See *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502, 516–17 (S.D.N.Y. 2019).

³⁰ See Questions Presented, *Dep’t of Commerce*, 139 S. Ct. 2551 (No. 18-966), <https://www.supremecourt.gov/qp/18-00966qp.pdf> [<https://perma.cc/8MJA-ZW43>]. When granting certiorari, the Supreme Court asked only the following questions to be briefed and argued:

1. Whether the district court erred in enjoining the Secretary of Commerce from reinstating a question about citizenship to the 2020 decennial census on the ground that the Secretary’s decision violated the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*
2. Whether, in an action seeking to set aside agency action under the APA, a district court may order discovery outside the administrative record to probe the mental processes of the agency decisionmaker—including by compelling the testimony of highranking Executive Branch officials—without a strong showing that the decisionmaker disbelieved the objective reasons in the administrative record, irreversibly prejudged the issue, or acted on a legally forbidden basis.

remained: just how badly would the Roberts Court damage the cause of political and racial equality?

Here's why this was a high-stakes dispute over equality even though the Court was never going to directly address the equality claim. The government's own Census Bureau had warned the Secretary of Commerce that asking about citizenship would reduce the accuracy of the census.³¹ Their models showed that it would likely lead to the undercounting of Hispanic citizens and noncitizens by increasing nonresponses by some 630,000 households.³²

According to the U.S. Constitution's Enumeration Clause, information about a state's "respective Numbers" from the census, to be taken every ten years, would be used to allocate representatives to the House of Representatives.³³ The Fourteenth Amendment specifically directs that representatives be allocated based on "the whole number of persons in each State, excluding Indians not taxed."³⁴

For their part, the plaintiffs had originally accused the Trump administration of violating the principle of equality in two respects: (1) expressing animus against noncitizens and/or Hispanic people, who are to be counted by the clear terms of the Constitution but might not be; and (2) damaging the political equality of states whose representation would be negatively impacted by undercounting noncitizens and racial minorities dissuaded from responding to census takers due to the question's inclusion.³⁵ At the time, plaintiffs built a circumstantial case of intent to harm on the basis of citizenship status and race.³⁶ The case was based on evidence that Commerce Secretary Wilbur Ross had decided to add the question after conversations with anti-immigration figures like Steve Bannon and Kris Kobach, plus the unequal effects of the policy change.³⁷

Id.

³¹ See Gregory Wallace, *Here's How the Census Bureau Can Find Out Who's a Citizen*, CNN (July 11, 2019), <https://www.cnn.com/2019/07/11/politics/census-citizenship-question-alternatives/index.html> [<https://perma.cc/9AZK-ATB4>].

³² See *Dep't of Commerce*, 139 S. Ct. at 2588 (Breyer, J., concurring) (citing Joint Appendix at 114, *Dep't of Commerce*, 139 S. Ct. 2551 (2019) (No. 18-996), Memorandum from John M. Abowd, Chief Scientist & Assoc. Dir. For Research & Methodology to Wilbur L. Ross, Jr., Secretary of Commerce (Jan. 19, 2018)).

³³ U.S. CONST. art. I, § 2.

³⁴ U.S. CONST. amend. XIV, § 2.

³⁵ See *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 515, 529 (S.D.N.Y. 2019).

³⁶ See *id.* at 664.

³⁷ See *id.* at 670–71.

On the other hand, there's no specific language in the Constitution that prohibits the government from inquiring about citizenship during a census,³⁸ and many nations already do just that.³⁹ If adding the question to the census violates the concept of equality, it's only because the exercise of otherwise permissible authority has become tainted by an improper motivation, not because there is, or should be, an absolute bar against this course of action. The circumstantial structure of the plaintiffs' equality claim helps us to understand why the four liberals on the Court, who suspected something nefarious was afoot, would be willing to swallow a less-than-ideal justification: they simply could not get enough votes for their more expansive position. But it doesn't explain how they pried the Chief away from his usual allies.

Now, why on earth would Chief Justice Roberts provide the critical fifth vote to stop the administration dead in its tracks, for all practical purposes? We will not know for sure until either Roberts speaks publicly on the matter or historians have had a chance to pore over the draft opinions and memos that were exchanged between chambers. But it's possible to venture some hypotheses based on what we know about the jurists' philosophical inclinations and their behavior in past high-profile disputes, such as when Roberts changed his mind at the last moment and found a way to uphold Obamacare.⁴⁰

The fractured outcome in the Census Case suggests that Roberts might have initially voted with his usual conservative colleagues, then at some point changed his mind. Experienced court watcher Linda Greenhouse points to the published texts themselves: "the opinions that provide the holding—the chief justice's plus the partially concurring opinion of Justice Stephen Breyer for the court's four liberals—have all the hallmarks of judicial tectonic plates that shifted late in the day to produce an outcome that none of the players anticipated at the start."⁴¹ I agree with Greenhouse's

³⁸ To be sure, it's theoretically possible to come up with a coherent theory about what the Census Clause is designed to accomplish, along with the later Reconstruction Amendments, that would create an absolute bar to a citizenship question. But the only point I want to make is that in the absence of clear language in the Constitution itself, finding a prohibition on asking about citizenship is a tough ask of a centrist jurist and a nonstarter with the most conservative members of the Court. *See also* *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566–67 (2019) (concluding that the Enumeration Clause implicitly permits Congress to ask questions about citizenship).

³⁹ *See id.* at 2563.

⁴⁰ *See generally* *Nat'l Fed'n of Indep. Bus.*, 567 U.S. 519 (2012).

⁴¹ Linda Greenhouse, *It's Not Nice to Lie to the Supreme Court*, N.Y. TIMES (July 3, 2019), <https://www.nytimes.com/2019/07/03/opinion/trump-supreme-court-census.html> [<https://perma.cc/2QEW-BREP>].

observation, though I'm going to push the point further and defend the Chief's possible flip-flop on broader egalitarian grounds.

The beginning of Roberts's opinion, which finds no objection from the Enumeration Clause itself from asking a citizenship question, feels like it initially appeared in a draft opinion upholding the agency's action, while the key section containing the analysis that's adverse to the government is buried like a last-minute insertion.⁴² Breyer's lengthy concurring opinion—joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan—reads like it might have originally been written as a dissent.⁴³ Most observers certainly felt after oral argument in August that there were five votes to uphold the government's position.⁴⁴

What happened? One theory is that, after voting with the conservatives and assigning the opinion to himself, the opinion just wouldn't write. That kind of thing has happened before.⁴⁵ It's a largely internal explanation that holds that certain doctrines can appear less convincing as the judge assigned to draft an opinion begins to actually work with them. But another, external, possibility is that Roberts was shaken by last-minute revelations that figures close to the administration added the citizenship question precisely to depress responses by noncitizens and artificially enhance the Republican Party's political power. So-called “smoking gun” evidence that bolstered the plaintiffs' theory of the case had appeared after the oral argument before the High Court, in the weeks before the decision was expected.⁴⁶

This extrajudicial evidence had been widely reported by the media but had not yet been tested in court. But it looked damning.⁴⁷ According to those

⁴² See generally *Dep't of Commerce*, 139 S. Ct. at 2561–63.

⁴³ See generally *id.* at 2584–95. (Breyer, J., concurring).

⁴⁴ See, e.g., Adam Liptak, *On Census Citizenship Question, Supreme Court's Conservatives Appear United*, N.Y. TIMES (Apr. 23, 2019), <https://www.nytimes.com/2019/04/23/us/politics/supreme-court-census-citizenship.html> [https://perma.cc/6XYF-7FDG]; Amy Howe, *Argument Analysis: Divided Court Seems Ready to Uphold Citizenship Question on 2020 Census*, SCOTUSBLOG (Apr. 23, 2019, 5:30 PM), <https://www.scotusblog.com/2019/04/argument-analysis-divided-court-seems-ready-to-uphold-citizenship-question-on-2020-census/> [https://perma.cc/3CWM-ZJMQ].

⁴⁵ See, e.g., Linda Greenhouse, *The Mystery of John Roberts*, N.Y. TIMES (July 11, 2012, 9:00 PM), <https://opinionator.blogs.nytimes.com/2012/07/11/the-mystery-of-john-roberts/> [https://perma.cc/76EL-89FP] (detailing how Justice Kennedy changed his mind in *Lee v. Weisman* after being assigned to draft the opinion upholding school-sponsored prayer).

⁴⁶ See Tara Bahrapour, *Justice Department Says Allegations That It Hid True Motives for Census Citizenship Question Are 'Frivolous'*, WASH. POST (June 3, 2019, 7:58 PM), https://www.washingtonpost.com/local/social-issues/justice-department-says-allegations-that-it-hid-true-motives-for-census-citizenship-question-are-frivolous/2019/06/03/9624871a-865a-11e9-a491-25df61c78dc4_story.html [https://perma.cc/8H4L-8WPC].

⁴⁷ See Tara Bahrapour & Robert Barnes, *Despite Trump Administration Denials, New Evidence Suggests Census Citizenship Question Was Crafted to Benefit White Republicans*,

reports, newly discovered computer files and email correspondence showed that a Republican consultant Tom Hofeller had advised key figures to add the citizenship question to the 2020 census after his own research indicated that doing so would give a political advantage to “Republicans and non-Hispanic whites.”⁴⁸ The Fourth Circuit took this evidence seriously, sending the appeal of a similar challenge to the census question back to the district court to assess the impact of this new evidence of bias.⁴⁹ Two days later, Chief Justice Roberts’s own bombshell then dropped. The message was unmistakable: don’t treat us like patsies.⁵⁰

Had the Justices rushed to ratify the administration’s decision after this blockbuster revelation, history could very well have judged them harshly. And they would have deserved it. The Court had recently suffered a well-deserved blow to its reputation for rendering impartial judgements after whitewashing Trump’s ban on travel from several Muslim countries.⁵¹ The possibility of damage to the Court’s stature from its handling of the Census Case could have been more lasting if it was perceived as part of a partisan and racist plot to entrench Republican power that lasted a decade or more. Already there was an impression in many quarters that the Roberts Court is a highly partisan institution, exacerbated by Kavanaugh’s seat “stolen” by Republicans through political hardball.⁵² The Supreme Court has always been a political institution, and it has sometimes been a nakedly partisan one. Even so, key to its legitimacy is avoiding unforced errors that wound its

WASH. POST (May 30, 2019, 9:07 PM), https://www.washingtonpost.com/local/social-issues/despite-trump-administration-denials-new-evidence-suggests-census-citizenship-question-was-crafted-to-benefit-white-republicans/2019/05/30/ca188dea-82eb-11e9-933d-7501070ee669_story.html [<https://perma.cc/24TJ-DK9K>].

⁴⁸ Michael Wines, *Deceased G.O.P. Strategist’s Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. TIMES (May 30, 2019), <https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html> [<https://perma.cc/L6PR-6CL9>].

⁴⁹ See Michael Wines, *Reopened Legal Challenge to Census Citizenship Question Throws Case Into Chaos*, N.Y. TIMES (June 25, 2019), <https://www.nytimes.com/2019/06/25/us/census-citizenship-question.html> [<https://perma.cc/VZR5-CM7Q>].

⁵⁰ See *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575–76 (“Accepting contrived reasons would defeat the purpose of [the reasoned explanation requirement of administrative law.] If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered . . . in this case.”).

⁵¹ See, e.g., Aziz Huq, *The Travel Ban Decision Echoes Some of the Worst Supreme Court Decisions in History*, VOX (June 26, 2018, 6:06 PM), <https://www.vox.com/the-big-idea/2018/6/26/17507014/travel-ban-interment-camp-supreme-court-korematsu-muslim-history> [<https://perma.cc/7GHA-5TTW>].

⁵² *The Stolen Supreme Court Seat*, N.Y. TIMES (Dec. 24, 2016), <https://www.nytimes.com/2016/12/24/opinion/sunday/the-stolen-supreme-court-seat.html> [<https://perma.cc/GAD6-5GVX>].

reputation in the second, and more corrosive, sense. Avoiding the impression that the Court is nothing more than an adjunct of the Republican Party is precisely the kind of concern that has led Roberts occasionally to think twice.⁵³

Although the census decision stopped short of actually finding animus or some other improper motives, characteristics of an Equal Protection violation, the rationale did provide the next best thing. There are three ways government action can fail the rule of reason: (1) it's motivated by an improper purpose—such as an unconstitutional motive; (2) there is insufficient support for the government's stated reason; or (3) the reason given is a "pretext" and so can't be believed—the mismatch between the evidence and the given reason is so great that what the lawyers are saying now in court are post-hoc rationalizations rather than the authentic motivations of the agency's decisionmakers.

Roberts's opinion declined to make a ruling about the government official's true motives and said that there is sufficient evidence to support the Secretary's decision to ask the citizenship question as one among several useful methods for gathering demographic information.⁵⁴ Yet, it held that the claim about needing citizenship information to enforce the Voting Rights Act nevertheless amounted to a pretext because there was "a significant mismatch between the decision the Secretary made and the rationale he provided."⁵⁵ Critically, this last finding alone was enough to block to the agency action.⁵⁶

Obviously, the big unanswered question Roberts's opinion refuses to answer is this: if the Voting Rights Act-based reason was a lie, then what was the agency's true reason? One thing we need to remember is that evidence of pretext can in some instances be treated as evidence of improper motive (it's evidence of a guilty mind, after all), especially when combined with other evidence of misconduct.⁵⁷ It's possible that Roberts was sufficiently concerned about discrimination but was unable or unwilling to make that finding. If that's right, then, sending the case back to the courts below then became the compromise that resolved those tensions, at least temporarily. But there can be little doubt that finding pretext improves plaintiffs' claim as to improper purpose in any subsequent proceedings.

⁵³ See generally JOAN BISKUPIC, *THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS* 329–32 (2019).

⁵⁴ See *Dep't of Commerce*, 139 S. Ct. at 2598.

⁵⁵ *Id.* at 2575.

⁵⁶ *Id.* at 2576.

⁵⁷ See *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 147 (2000).

That brings us to the curious role of time. As political theorist Elizabeth Cohen observes, time “is a valuable good that is frequently used to transact over power.”⁵⁸ Cohen also notes that “time can sometimes also be used as a means of rectifying injustices”⁵⁹—including by promoting egalitarian ends. Usually, though, when time is of the essence in the justice system, that factor strengthens the government’s hand because lawyers can claim some kind of exigency for its actions. And most of the time, that added psychic stress renders judges incredibly compliant with the government’s demands. All along, DOJ insisted that a final decision by the end of June was necessary so the administration could meet its constitutional obligation to perform the census on time.⁶⁰

This time, an impending deadline didn’t damage the pro-equality position. To the contrary, time was very creatively manipulated to shorten the clock and thereby promote egalitarian ends. That Roberts was willing to prolong the proceedings by invoking the rule of reason was surprising, since it raised the very real possibility that the administration would lose this fight on a *de facto* basis: it might simply have to concede defeat and print the census forms without the question because there wouldn’t be enough time to defend against the remaining claims in the case. That Roberts was willing to swallow this possibility strongly suggests that he wanted to avoid an outcome he felt was somehow worse (e.g., the perception of whitewashing misconduct) or that he was persuaded there really was a colorable Equal Protection argument but just couldn’t bring himself to say so on the record before him.

Either way, the rule of reason suddenly seemed like an attractive justification to avoid a regrettable precedent or to give the plaintiffs a fair chance to probe the new evidence. And, if a conservative like Roberts had concerns about any downstream consequences of actually holding that the Equal Protection Clause operated as a viable constraint on the Enumeration Clause, that day was pushed into the distance for now, particularly if there was a chance the dispute could evaporate on its own.

There was certainly some risk this time-based gambit would fail. In theory, the ruling gave the administration another bite at the apple, so the rule of reason was not formally an end-of-the-line loss for proponents of the citizenship question. This allowed the government to claim that the power it

⁵⁸ ELIZABETH F. COHEN, *THE POLITICAL VALUE OF TIME* 3–4 (2018).

⁵⁹ *Id.* at 17.

⁶⁰ Motion for Expedited Consideration of the Petition For a Writ of Certiorari Before Judgment and for Expedited Merits Briefing and Oral Argument in the Event that the Court Grants the Petition at 4–5, *Dep’t of Commerce*, 139 S. Ct. 2551 (No. 18-966).

exercised was in fact a lawful one, as well as to spend some time looking for ways to come up with a new reason for adding the question to the census.

Roberts's behavior reminds me of another occasion where the stakes for equality were apparent to all, and where he showed a willingness to cross the ideological divide and join the more liberal members of the Court when he has been convinced that the scope of a precedent could be carefully limited. In 2017, Justice Roberts wrote the opinion in *Buck v. Davis* overturning Duane Edward Buck's death sentence because of an unacceptable risk that racial discrimination had infected the proceedings.⁶¹ The defendant's own court-appointed lawyer had put on an expert who testified that being black made someone more dangerous.⁶² That this testimony was irrational—*e.g.*, its introduction violated the rule of reason—ended up appealing to Roberts.

Undoubtedly comforted that the precedent wouldn't remake the entire justice system, Justice Roberts gave one of his most eloquent vindications of equality, saying that the expert's testimony "appealed to a powerful racial stereotype—that of black men as 'violence prone.'"⁶³ That mistake, he insisted, improperly made "race directly pertinent on the question of life or death."⁶⁴ But it wasn't formally an equal protection case; it was a Sixth Amendment right to counsel case.⁶⁵ The apparent violation of rule of reason norms had apparently unlocked Roberts's egalitarian sensibility.

III. THE RULE OF REASON AS A SUBSTITUTE FOR EQUALITY

More broadly, the rule of reason can occasionally serve as a second-best solution when equality as a principle seems out of reach. As I've explained, there is a deep connection between enforcing the demands of reason and safeguarding political minorities. Any doctrine that checks blind deference to government officials, and along the way emphasizes empiricism, can only enhance the project of building a more equal and just society—given that it's already so hard to convince those in power to see bias and, even when they see injustice, to do something about it. The Census Case puts government officials on notice that their explanations will, in fact, be scrutinized and that they have to make sense. This is something that egalitarians should cheer.

The rule of reason runs throughout our constitutional and common law tradition, appearing in everything from the concept of self-defense to the Fourth Amendment to the Equal Protection Clause. The Administrative

⁶¹ *Buck v. Davis*, 137 S. Ct. 759, 776–77 (2017). On that occasion, Roberts and Kennedy both joined the liberals, making it a 6–2 ruling. Thomas, joined by Alito, dissented.

⁶² *See id.* at 776.

⁶³ *Id.*

⁶⁴ *Id.* at 777.

⁶⁵ *See id.* at 767.

Procedure Act codifies a version of this approach, balancing agency expertise, accuracy, and accountability.⁶⁶ Roberts's opinion demonstrated the critical features of the rule of reason as I've described them elsewhere.⁶⁷ First, power must always be justified, and it's more than about *who* gets to decide a question.⁶⁸ Second, a governmental justification must be grounded in empirical reality.⁶⁹ Third, reasons given "must be truthful in the sense that they are addressed to real problems rather than fabricated crises, the reasons can't be ginned up after the fact, and the solutions should be fairly well suited to the problem that has been identified."⁷⁰

Ensuring that government reasons are based in evidence is another way of protecting vulnerable minorities because those who would do harm to them will seek to cut corners by appealing to emotions, exaggerated concerns of safety or public purpose—or in this case, wildly implausible arguments that a move that objectively hurts minorities actually is benign and intended to help them.⁷¹ Moreover, systematic tolerance of falsehoods doesn't just license incompetence; it also makes bias more difficult to uncover. As I've explained, "[e]xcluding falsity from the range of reasonable solutions helps prevent domination of the less educated . . . and those with inadequate access to reliable information."⁷² Thus, enforcing the rule of reason can help noncitizens and racial minorities, who aren't always able to defend their own interests through ordinary political processes.⁷³

The two rationales are not identical, though. Beyond the expressive differences in the rationales, the rule of reason traditionally gives an agency more leeway than the principle of equality to come up with a different justification for its decision when there is an earlier, tainted one. On the other hand, we were not likely to see a holding that the government was forbidden

⁶⁶ 5 U.S.C. § 706(2) (2018).

⁶⁷ See generally TSAI, *supra* note 11, at 93–136.

⁶⁸ See *id.* at 106.

⁶⁹ See *id.*

⁷⁰ *Id.* at 107. It's true that there is a difference of opinion over how much deference someone should get. In Roberts's view, an evidence-based reason by someone in authority like the Secretary of Commerce is sufficient. See *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2568–69 (2019). It matches his view of the presidency where control by the president or high officials is paramount. By contrast, the dissenters believe that this decision should not be reviewed by the courts, *id.* at 2597–98 (Alito, J., dissenting), or that the record sufficiently supported Secretary Ross's decision, *id.* at 2576 (Thomas, J., dissenting).

⁷¹ See *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 512, 617–18 (S.D.N.Y. 2019).

⁷² TSAI, *supra* note 11, at 107.

⁷³ Cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (explaining the representation-reinforcing theory of judicial review, another way constitutional law can protect those whose interests are not protected through ordinary political process).

from ever asking about citizenship on the census. A direct and broad exposition on equality was never really in the cards here. Nor was the Court ever going to impose a substantive limit, barring certain kinds of demographic information from being collected through the Census. Under those circumstances, Roberts's ruling is a good outcome because it tangibly protects the rights of an embattled community and it's useful in a forward-looking way to promote norms and practices upon which development of the idea of equality depends.

The dissenters are probably wrong that the "pretext" holding will somehow open the floodgates to judicial second-guessing of agency decisions.⁷⁴ People unhappy with agency decisions will surely sprinkle the case in their briefs, but my guess is that, in most disputes, it will have no impact. As Roberts points out, this is the "rare" case with such an "extensive" record,⁷⁵ even though the Supreme Court had earlier blocked efforts to depose Secretary Ross. Most challenges to agency decisions will remain as easy cases based on a minimal record, where policy views are divided but no serious constitutional difficulties lurk. In other words, this precedent will be most potent when it can serve as a brokered stand-in for some other constitutional violation when consensus is hard to reach for a stronger justification.

If I'm right about this, the Census Case slots in comfortably among an older line of cases in which a law or policy has been judicially stricken as irrational, in circumstances where a serious claim of unequal treatment has been made but practical considerations frustrated the resolution of the dispute as a more robust equality violation.⁷⁶ These cases have always bothered the purists among us, who might be frustrated by their failure to observe certain doctrinal niceties (e.g., a thorough application of the tiers of scrutiny approach) or the absence of a more robust theory of equality. But for those who believe that justice is an inescapably collaborative exercise and that the grounds for compromise aren't always straightforward or aesthetically pleasing, these precedents are nevertheless principled and have value in both promoting consensus and ameliorating harms.

⁷⁴ *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2576 (2019) (Thomas, J., dissenting).

⁷⁵ *Id.* at 2575 (majority opinion).

⁷⁶ See generally, e.g., *Romer v. Evans*, 517 U.S. 620 (1996); *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973); *Ledezma-Cosino v. Lynch*, 819 F.3d 1070 (9th Cir. 2016); *Christian Heritage Acad. v. Okla. Secondary Sch. Activities Ass'n*, 483 F.3d 1025 (10th Cir. 2007); *Copelin-Brown v. N.M. State Pers. Office*, 399 F.3d 1248 (10th Cir. 2005).

Of these cases, *United States Department of Agriculture v. Moreno*⁷⁷ might be the closest analogue. There, the Justices invalidated an agency's interpretation of the Food Stamp Act, which barred benefits to anyone who lived in a household where residents were not "all related to each other."⁷⁸ There was some concern about bias against hippies, but neither the agency's guidelines nor the federal law made the mistake of overtly making that distinction.⁷⁹ On top of that, hippies as a group probably would not have satisfied the test usually employed to identify a "discrete and insular minority" justifying elevated judicial scrutiny.⁸⁰ Nevertheless, at a decisive moment in the decision, the Court found that the agency guideline "simply does not operate so as rationally to further the prevention of fraud."⁸¹ In other words, there was a mismatch between the reason given and the evidence about how the policy actually operated—just like in the Census Case.⁸²

It's important to note that the Justices there, too, felt that the rule of reason would be helpful in reducing discrimination against the poor. As Justice William O. Douglas pointed out separately, laws of this sort tended to fall heaviest on "desperately poor people with acute problems."⁸³ Similarly, in the Census Case, Justice Breyer underscored the impression among four Justices that something more serious lay behind the pretext: the possibility of intentional discrimination, or at least unequal impact on some members of society and certain jurisdictions.⁸⁴ They preferred the stronger medicine that adding the citizenship question was "arbitrary and capricious" because it would "likely cause a disproportionate number of noncitizens and Hispanics to go uncounted . . . [and] create a risk that some States would wrongfully lose a congressional representative and funding."⁸⁵

In an age when public officials have become more brazen in their mendacity and democratic backsliding has grown as a serious problem,⁸⁶ Roberts's opinion is a welcome reminder that facts still matter and

⁷⁷ 413 U.S. 528 (1973).

⁷⁸ *Id.* at 530.

⁷⁹ *Id.* at 534.

⁸⁰ See generally *United States v. Carolene Prods.*, 304 U.S. 144, 153 n.4 (1938).

⁸¹ *Moreno*, 413 U.S. at 537.

⁸² See my discussion of why the solution in *Moreno* was less robust, and possibly intrusive, than the rights-based solutions presented by other Justices. See TSAI, *supra* note 11, at 109–11.

⁸³ *Moreno*, 413 U.S. at 541.

⁸⁴ See *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2584 (2019) (Breyer, J., concurring).

⁸⁵ *Id.*

⁸⁶ See Robert L. Tsai, *Manufactured Emergencies*, 129 YALE L.J. FORUM 590, 592, 597 & n.27 (2019). See generally STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2019).

government officials won't get blind deference. Rule of reason norms are especially helpful for the project of equality because (1) technological advances make it possible for enemies of equality to pursue nefarious goals in sophisticated ways; (2) bureaucratic complexity and social networks make it easier to plot while covering one's tracks; and (3) the government's incredibly smart lawyers can dazzle judges with all manner of doctrinal excuses and distractions. A due regard for empiricism enhances the work of equality; conversely, formalism catches only the most stupid, brazen, and inexcusable forms of injustice.

There's another case that comes to mind, where considerations of equality lurked in the background, but the dispute was resolved according to the rule of reason. Once again, as in the Census Case, "the evidence tells a story that does not match the explanation."⁸⁷ The case is *Cleburne v. Cleburne Living Center*, where the Justices overturned a local ordinance that prohibited group homes for the "feeble-minded."⁸⁸ There, government officials tried to argue that the requirement existed to help minorities rather than hurt them, but the Court found that incoherent.⁸⁹ At that historical moment, the Justices could've tried to develop the law in a more robust way to protect disabled people more generally. The administration vigorously opposed such a move, however, and there was insufficient support once again for a more comprehensive doctrine to protect the disabled.

The good news is that the failure to agree on a more general approach to ensuring the equal treatment of all disabled people didn't leave the deeply problematic ordinance in place. Instead, the Justices found a way around the roadblock. They were able to say that the law rested upon "mere negative attitudes" against intellectually disabled people.⁹⁰ Meanwhile, the debate over how best to deal with disability-based discrimination was left to percolate. Some commentators have read this merely as a case about animus, but a key moment in the analysis found the city's explanations pretextual. Justice White's opinion walked through the various reasons given by the city to justify the ban—to keep intellectually disabled people safe from flood waters, to ensure the tranquility of the neighborhood, to make sure the less fortunate aren't teased by nearby schoolchildren—and found them all inadequately supported by the evidence.⁹¹ This feature of the decision—which is all about how a government justification can be irrational but not

⁸⁷ *Dep't of Commerce*, 139 S. Ct. at 2575.

⁸⁸ *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 436 (1985).

⁸⁹ *See id.* at 448–50.

⁹⁰ *Id.* at 448.

⁹¹ *See id.* at 448–50.

necessarily express hatred—can stand alone from the Court’s further inference that the real reason was fear of disabled people.

It’s worth noting that then–Chief Justice William Rehnquist signed off on this practical solution in *Cleburne*,⁹² just as Chief Justice Roberts found the rule of reason attractive in the census dispute. Both men enjoy a reputation as institutional conservatives who not only cared about the historical reputation of the Supreme Court, but also could be moved by procedural values even if they were skeptical of far-reaching theories of rights.⁹³

In terms of the census fight, the ruling gave the plaintiffs the opportunity to move forward with discovery to try to connect the dots between the new evidence of bias and key administration figures. At the same time, it left room for policymakers to try to probe their options and pacify a disgruntled president. They could try to moot the earlier action by beginning a new process and developing a different justification for asking about respondents’ citizenship. A few of the president’s allies briefly floated a plan for him to sign an executive order or memorandum claiming some sort of emergency to justify adding the question at the last moment⁹⁴—though they would be hoping that judges would agree that the executive branch has a more active role in conducting the census than what the Constitution seemingly says. Of course, whether a new reason would really be “new” and sufficiently untainted by the previous “pretextual” reason would be an important question.

At all events, time was not on the administration’s side. Even if President Trump bypassed the administrative process by signing an executive order, litigation would still follow.⁹⁵ On this score, the additional costs imposed on the government by enforcing the rule of reason, plus the judicial admonishing about lying to judges, were already worth its weight in gold to those concerned about the anti-equality effects of the administration’s plan. Armed with additional, more thorough evidence, the

⁹² See TSAI, *supra* note 11, at 96–98. See generally William D. Araiza, *Was Cleburne an Accident?*, 19 U. PA. J. CONST. L. 621, 641–48 (2017).

⁹³ See TSAI, *supra* note 11, at 97 (explaining how Rehnquist opened the door to consensus based on the rule of reason with more liberal jurists in *Cleburne* by saying “‘it would not bother me greatly’ to resolve the controversy in this fashion”); Greenhouse, *supra* note 45.

⁹⁴ See David B. Rivkin Jr. & Gilson B. Gray III, *How to Put Citizenship Back in the Census*, WALL ST. J. (July 4, 2019, 2:20 PM), <https://www.wsj.com/articles/how-to-put-citizenship-back-in-the-census-11562264430> [<https://perma.cc/R6CP-9MRV>]; Michael Wines & Adam Liptak, *Trump Considering an Executive Order to Allow Citizenship Question on Census*, N.Y. TIMES (July 5, 2019), <https://www.nytimes.com/2019/07/05/us/census-question.html> [<https://perma.cc/A468-N3ZK>].

⁹⁵ See Rivkin & Gray, *supra* note 94.

record could look very different from the one originally before the Supreme Court—especially if the trial judge finds a violation of the Equal Protection Clause on remand after a full trial.

On July 11, 2019, the administration decided to throw in the towel.⁹⁶ There would be no citizenship question on the 2022 census.⁹⁷ Reality had finally settled in that the president would either have to resort to extralegal means to get his way, or else risk disrupting the census and increase the possibility of an inaccurate count. Promising not to add the question to the 2022 census ensured that no more embarrassing details about Republican gerrymandering efforts would come from this lawsuit. Key figures involved in the decisions would no longer be under threat of being deposed under oath.

At a hastily assembled press conference at 5 p.m., President Trump tried to put a happy face on his decision by announcing that he was signing an executive order ordering all agencies to give citizenship information to the Census Bureau,⁹⁸ but that's something he could already have done. In the same press conference, Attorney General William Barr said "it was a logistical impediment, not a legal one."⁹⁹ But that's not quite right. The legal standard—the rule of reason—in this instance created a formidable logistical impediment that proved exceedingly difficult to overcome.

CONCLUSION

When full-throated equality was not procedurally or strategically possible, the rule of reason had become the language of consensus and justice. The Court had all but closed the gap for executive response by releasing the decision on the last day of the term, June 27, just four days before the date the Solicitor General had indicated as the date on which forms needed to begin printing. Barr acknowledged the potency of Roberts's gambit:

There is simply no way to litigate these issues and obtain relief from the current injunctions in time to implement any new decision without jeopardizing our ability to carry out the census, which we're not going to do. . . . So as a practical matter, the Supreme Court's decision closed all paths to adding the question to the 2020 census.¹⁰⁰

⁹⁶ See Remarks by President Trump on Citizenship and the Census, THE WHITE HOUSE (July 11, 2019, 5:37 PM), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-citizenship-census/> [<https://perma.cc/M3PZ-X566>].

⁹⁷ See *id.*

⁹⁸ See *id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

The President did suggest that the administration might later take the position that the allocation of political power could still take place based on citizens or the “voter-eligible population” rather than the entire population in a state,¹⁰¹ but that’s a constitutional fight for another day.¹⁰² The precise set of equality concerns and risks identified by this lawsuit—undercounting through deterrence—had been dealt with effectively.

A different administration could try again in 2030, but litigation would surely follow. Whatever happens next, it cannot be gainsaid that the rule of reason operated as an effective substitute for equality when a ruling on that ground was simply not possible. And the awful chain of events feared by at least four Justices, experts at the census bureau, and many friends of equality has not transpired. That’s a win for equality, even if it took a work-around to get there.

¹⁰¹ *See id.*

¹⁰² Indeed, the President’s executive order invites states to do something that no state has yet tried to do: “design State and local legislative districts based on the population of voter-eligible citizens” rather than all people. Exec. Order No. 13,880, 84 Fed. Reg. 33,823 (July 16, 2019). The constitutionality of such a plan has not been addressed by the U.S. Supreme Court. *See id.* 33,823–24. However, according to Trump, the Department of Commerce indicated that “if the officers or public bodies having initial responsibility for the legislative districting in each State indicate a need for tabulations of citizenship data, the Census Bureau will make a design change to make such information available.” *Id.* at 33,824.